Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1554

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

vs.

CLIFFORD W. CARRIER ,

Respondent.

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On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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# BRIEF OF AMICUS CURIAE STATE OF FLORIDA

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## QUESTION PRESENTED

THIS COURT SHOULD REJECT COUNSEL'S INADVERTENCE OR OVERSIGHT AS CONSTITUTING CAUSE WITHIN THE MEANING OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND SHOULD GIVE DEFINITION TO THAT TERM FOR THE BENEFIT OF THE BENCH AND THE BAR.

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This brief is submitted by the State of Florida in support of the Petitioner, Allyn R. Sielaff.

## INTEREST OF AMICUS CURIAE

The State of Florida, in the administration of its criminal justice system, has found it essential to employ what has become known as the contemporaneous objection rule to insure the integrity of its judicial system and to promote the finality of its judgments and sentences. To that end, Florida has vigorously sought to defend the viability of that principle of law in this Court. Wainwright v. Sykes, 433 U.S. 72 (1977).

The decision rendered by the United States Court of Appeals for the Fourth Circuit in the case of Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1984), affirmed on rehearing, Carrier v. Hutto, 754

F.2d 520 (4th Cir. 1985), cert. granted sub. nom., Sielaff v. Carrier, 53 U.S.L.W. 3911 (1985), if sustained, would lead to the emasculation, if not the destruction, of that rule and render judgments and sentences imposed by the courts of the State of Florida vulnerable to attack in the federal district courts through the writ of habeas corpus.

Florida's interest in the integrity and finality of its judgments and sentences, both past and future, cannot be questioned and it believes that an adverse ruling in this cause would have a profound and adverse impact upon its entire criminal justice system.

## SUMMARY OF ARGUMENT

The State of Florida, as amicus curiae, strenuously submits that this Court must repudiate the lower tribunal's employment of the "inadvertence of counsel" or "oversight" theory as a vehicle for reaching the merits of defaulted claims heretofore rendered unreviewable by the Sykes-Engle doctrine. In so arguing, the State of Florida urges this Court to overrule Fay v. Noia, infra, and suggests that it provide the bench and bar with a workable definition of "cause" tailored to serve the legitimate demands of justice while giving due, albeit equal, deference to the rights of the accuser as well as the accused.

Essentially, the State of Florida

maintains that anything less than this Court's unequivocal rejection of the lower court's efforts to equate inadvertence of counsel with "cause" for purposes of excusing a state prisoner's procedural default would vitiate the long awaited and enthusiastically received remedial measures this Court afforded the several states through its decisions in Wainwright v. Sykes, infra, and Engle v. Isaac, infra. Indeed, any other result reached by this Court would herald a return to the havoc spawned by Fay--the egregious erosion of the finality of state criminal judgments and sentences--and would once again transform Justice Harlan's incisive dissent therein into a prophecy fulfilled.

It is precisely this potential for irreparable damage to the administration of justice on the state level that compels this Court to abate the seemingly relentless attempts to circumvent the Sykes-Engle doctrine by overruling Fay in no uncertain terms, and by promulgating criteria properly constituting cause within the meaning of Sykes-Engle.

## ARGUMENT

In Fay v. Noia, 372 U.S. 391 (1963), this Court, in a sharply divided opinion, held that a claim not raised and disposed of in a state court criminal proceeding in accordance with legitimate procedural requirements could be presented and considered unless the State could demonstrate that the petitioner "knowingly and intelligently" relinquished the right asserted.

Justice Clark, in a short but concise dissent, expressed grave concerns regarding the impact Fay would have upon the finality of state court judgments. 372 U.S. at 445-447. He succinctly stated:

> . . . the effective administration of criminal justice in state courts receives a staggering blow. Habeas

> corpus is in effect substituted for appeal, seriously disturbing the orderly disposition of state prosecutions and jeopardizing the finality of state convictions in disregard of the states' comprehensive procedural safeguards which, until today, have been respected by the federal courts. Essential to the administration of justice is the prompt enforcement of judicial decrees. After today state judgments will be relegated to a judicial limbo, subject to federal collateral attack--as here --a score of years later despite a defendant's willful failure to appeal . . .

372 U.S. at 446.

Justice Harlan, in a brilliant dissenting opinion in which Justices Clark and Stewart concurred, forewarned what would result from the rule announced in the majority opinion authored by Justice Brennan. 372 U.S.

at 447-476. Indeed, he recognized that to carry the principle of Fay ". . . in full force to cases in which a defendant is represented by counsel not shown to be incompetent is to undermine the entire representational system . . . and that under this approach, there could never be a binding waiver, since only an incompetent would give up a right without any good reason, and an incompetent cannot make an intelligent waiver . . ." Id. at 471-472. He also opined, correctly as subsequent history demonstrates, that the ". . . effect on state procedural rule, may be disastrous . . ." Id. at 472. Interestingly, the hypothetical example he used to demonstrate the vice of Fay, id. at 463, came before this Court in Francis v.

Henderson, 425 U.S. 536 (1976).

Justice Stewart's majority opinion in Francis affirmed the denial of a writ of habeas corpus because of non-compliance with Louisiana's procedural rules over Justice Brennan's dissent based on Fay, supra. Six members of this Court recognized that the enforcement of federal procedural requirements in federal criminal trials entitled the states to no less under Younger v. Harris, 401 U.S. 37 (1971). Francis, supra, at 541, 542. Justice Harlan was vindicated by Francis although it went unnoticed by the casual reader and many federal inferior courts.

In Estelle v. Williams, 425 U.S. 501 (1976) the Court, in an opinion authored by the Chief Justice, speaking

for six Justices, reversed the Court of Appeals' grant of the writ because the defendant failed to timely object in the state trial court to being tried in prison garb. That case made it clear that the broad language in Fay was suspect and Fay's days were numbered. Justice Brennan again dissented on the basis of Fay. It was obvious to anyone familiar with federal habeas corpus that Fay had indeed wreaked havoc with the finality of state court judgments and sentences and the administration of justice in state courts. State courts felt obligated to ignore their own contemporaneous objection rules in an effort to adjudicate claims in their own forums rather than in federal forums years later. To be sure, Justice Clark's

and Justice Harlan's predictions, ignored by the majority in Fay, were by this time totally and completely appreciated by those affected by the full impact of Fay's scope and breadth.

Wainwright v. Sykes, supra, building upon Estelle and Francis, finally restored the balance by establishing the integrity and legitimacy of the contemporaneous objection rule employed by most jurisdictions. While the Court created the "cause" and "prejudice" test--which was no more than the "exceptional circumstance" doctrine that existed prior to Fay--no definition of "cause" was provided. It is apparent that the Court did not want to establish a rule which might prove inflexible or unduly narrow given our incapacity to predict all

conceivable circumstances. What was important in Sykes, however, was the recognition that the protection of the defendant's rights rested with counsel and that the defendant was bound by the acts of competent counsel. It also recognized that it was totally unrealistic to require a "knowing and intelligent" waiver from the defendant personally on most matters, particularly those that must be raised during the course of the trial. Burger, C. J., 433 at 93 and Stevens, J., 433 at 95. See also, Estelle, supra, at 512. These were the identical points stressed by Justice Harlan in his dissent in Fay.

In all too many instances Sykes was ignored or avoided but, more importantly, efforts were made to emasculate its

salutory effect. The "futility doctrine", a novel argument indeed, met with success in the lower federal courts only to have this Court correctly repudiate it as a legitimate basis for cause.[1] Engle v. Isaac, 456 U.S. 107 (1982). The "novelty doctrine" emerged and gained limited acceptance in the plurality opinion rendered in Reed v. Ross, 468 U.S. ___, 82 L.Ed.2d 1 (1984) principally because Justice Powell concurred in the judgment on a very narrow ground.

The doctrine which was most

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[1]Novel and correctly rejected since it presumes a neutral and detached judicial officer would ignore a proper legal objection when timely made--something no appellate court should assume. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979).

tenaciously pursued however was the "inadvertence of counsel" or "oversight" doctrine--the theory utilized by the lower tribunal in the case sub judice. This Court should and must repudiate this concept as has almost every Court of Appeals that has addressed the subject.[2]

Of course, those courts are accurate in that the Sykes-Engle doctrine would

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[2] Lumpkins v. Ricketts, 551 F.2d 580 (5th Cir. 1977), cert. denied, 434 U.S. 957; Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); Indiviglio v. United States, 612 F.2d 524 (2d Cir. 1979), cert. denied, 445 U.S. 933; Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899; Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983), cert. denied, 78 L.Ed.2d 266; Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. denied, 104 S.Ct.274; and Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc, cert. denied, 440 U.S. 974. In each case the courts held such a rule would, "if accepted, effectively eliminate any requirement of showing cause at all." 551 F.2d at 683.

be rendered nugatory if inadvertence of counsel constituted "cause". Chief Justice Burger in Estelle must have appreciated this obvious fact for he noted:

> . . . It is not necessary, if indeed it were possible, for us to decide whether this [the failure to object] was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion . . .

425 U.S. at 512, n. 9.

The undersigned stated to this Court many years ago that few attorneys would willingly testify before a court that they were attempting to "sandbag" the trial judge in the hope of securing a reversal, if their clients were convicted. Kenneth Roosevelt Williams v. State of Florida, Case No. 5732,

October Term 1970, response at p. 6. Counsel will always say that in the heat of the trial he "overlooked" or failed to "appreciate" the putative error, and will be quite quick to admit his action was not strategic.[3]

Even if the failure to object was inadvertent, the effect upon the finality of the judgment is the same--it is destroyed! It should be recalled that the defendant is only entitled to competent counsel, not perfect or errorless counsel, Engle v. Isaac, supra, and if the State and Federal Governments must insure the acts of counsel, no judgment or sentence will withstand

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[3] Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), n. * at 211.

collateral assault, and the contemporaneous objection rule will become a relic of the past. More importantly, however, adoption of the inadvertence or oversight doctrine would produce "slovenly" defense practice, Levin v. Katzenbach, 363 F.2d 287, 294 (D.C. Cir. 1966) Burger, J. dissenting, at best, and at worst would promote questionable defense conduct, to wit: "sandbagging", which no court should tolerate. Wainwright v. Sykes, supra.

Just this term this Court, on direct appeal in a federal criminal case, reversed two decisions because counsel had not timely objected to the putative error. United States v. Young, 470 U.S. ___, 84 L.Ed.2d 1 (1985) and United States v. Gagnon, 470 U.S. ___,

84 L.Ed.2d 486 (1985). In Young the Court quoting from United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) said:

> . . . counsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that [the prosecutor's] comments to the jury were improper and prejudicial . . .

85 L.Ed.2d at 13, n. 13.

This footnote is remarkably similar to the Florida Supreme Court's decision in State v. Jones, 204 So.2d 515 (Fla. 1967), wherein the Court established the contemporaneous objection rule, although it was not denominated as such. The Florida Supreme Court said it this way:

Thus, it is seen that to invoke the exception the remark must be of "such character" that it is both "obviously prejudicial" and ineradicable from the minds of the jury.

Previous decisions of this Court indicate broad liberality in applying the exception to the end that there be no infringement in the trial courts of fundamental rights of persons charged with crime. Such an attitude was appropriate in view of the fact that prior to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733, it was in the trial of capital cases only that indigent defendants were given the assistance of counsel. This meant that many defendants who were unable to hire an attorney and who were unskilled in court procedure and ignorant of their rights were vulnerable to abuses of overzealous prosecutors. Under such circumstances this Court could do naught but charge the trial judge

with the responsibility of prompt and decisive action by ordering a mistrial in such cases. The exception as thus recognized was intended to have this salutary effect. "As Heaven does its rains, showers, its favors alike on the high and the low, the rich and the poor," the exception had to be applied to those with counsel as well as to those without counsel. This made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remained unassailable.

Such procedure is unmindful that an important function of an attorney in a trial is to assist the court. It is the judge's responsibility to supervise the trial. If counsel

performs his duty and promptly calls attention to remarks of the prosecutor which he considers prejudicial the court can excuse the jury, hear from both sides and forthwith take appropriate action if the remark in fact is found to be improper. See Rogers v. State, 158 Fla. 582, 790, 30 So.2d 625.

Prior to the Gideon case the good resulting from the application of the exception over-shadowed the evil, for trial judges, notwithstanding the absence of objection, were admonished to intervene, sua sponte, and declare a mistrial thus assuring to many uninformed defendants on trial without counsel a fair and impartial trial.

At the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights.

Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."

It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle-ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection

> of society. As Mr. Justice Cardozo explained in Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed.2d 674, 687:
>
> > "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
>
> The Court now recants the statement of the exception upon which respondent relies and henceforth will review challenged argument of prosecutors only when an objection is timely made.

204 So.2d 518-519.

Jones like Young involved unobjected to closing argument by the public prosecutor and both decisions were based upon a recognition that preservation of an issue by timely

objection is an essential ingredient of the just and fair administration of law.

Anyone familiar with the everyday practice of law understands that without an objection many things occur that prevent or impede the proper disposition of an issue. First, the record is not properly developed and the appellate court cannot even determine what the facts are which are necessary to decide the issue. Cardinale v. Louisiana, 394 U.S. 437 (1969). Second, the trial judge is deprived of an opportunity to correct any error in the first instance. Wainwright v. Sykes. Lastly, the potential for sandbagging always exists. Wainwright v. Sykes.

These essential requisites to the

administration of justice, of course, are defeated if the defendant can merely file a collateral proceeding and obtain the desired result--particularly when, many years later, memories have faded or witnesses have died, thus rendering retrial impossible. Smith, Federal Habeas Corpus--A Need for Reform, J. Crim.L., C & P.S. (1982).

It should be observed that this Court won't allow federal prisoners to resort to habeas corpus for the purpose of raising issues that could have and should have been raised at trial and, if preserved, on direct appeal. Timmreck v. United States, 441 U.S. 780 (1979). The Florida Supreme Court will not allow Florida's collateral proceedings to be used in such fashion

either.[4]

The doctrine adopted below and that urged before the court by the Respondent, if accepted by this Court would, under Kaufman v. United States, 394 U.S. 217 (1969), be applicable to habeas corpus petitions filed by both state and federal prisoners and the Court would destroy its own contemporaneous objection rule recently reaffirmed in Young and Gagnon, supra. This conclusion compels the result this Court must reach--that is to affirm the viability of the contemporaneous objection rule. To do otherwise would return us to the circumstances

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[4]State v. Matera, 266 So.2d 661 (Fla. 1972); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980).

which existed under Fay prior to its severe constriction in Sykes. Indeed, if Fay still lives,[5] perhaps it should be overruled. In light of Bullington v. Missouri, 451 U.S. 430 (1981) that "grisly choice" presented in Fay can never occur in the future.

The amicus suggests that "cause" can be defined so as to accommodate the legitimate demands of justice. "Cause" should be: (1) the denial of an opportunity to raise the issue under state law, e.g., the trial judge refuses to entertain an objection or argument on the issue or is shown to be a non-neutral magistrate, Stone v. Powell, 428 U.S. 465 (1976); (2) the right

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[5] United States v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983).

asserted involves a newly created right determined to be retroactive which reasonably competent counsel could not foresee or develop, Engle v. Isaac, supra; (3) the prosecutor withheld material evidence, not available to the defendant or his attorney through the exercise of due diligence, which directly affected the ability of counsel to factually develop or construct the claim, cf. United States v. Bagley, 473 U.S. ___, 87 L.Ed.2d 481 (1985); or, (4) any other impediment not attributable to the defendant or his attorney that prevented the assertion of the belated claim.

This definition provides a narrow but legitimate avoidance of the harsh effects of the contemporaneous objection

rule to insure against a miscarriage of justice while at the same time affording society its legitimate right to administer its criminal justice system free from unwarranted interference by the lower federal courts. Younger v. Harris, supra.

Florida submits that this Court should define "cause" in the narrow fashion suggested above so that the lower federal courts will understand and give effect to the default doctrine. So long as cause remains undefined lower courts will, as they have repeatedly done in the past, look for ways to avoid the "procedural" bar so the "merits" can be disposed of, oft times to the detriment of society.

## CONCLUSION

Attorney inadvertence or oversight is nothing more than a post-hoc label created to avoid the Sykes-Engle doctrine in an effort to return convicted defendants to the unworthy position they enjoyed under Fay. While Florida readily understands the desire of defendants to return to that era, it submits that history and experience has demonstrated the administration of justice would suffer irreparable injury and that the public confidence in the criminal justice system would be totally lost, and rightly so.

Respectfully submitted,

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